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BEFORE THE
STATE OF WISCONSIN

MC

DIVISION OF HEARINGS AND APPEALS

Investigation on Motion of the Department)	Case No. 3-SD-93-2066
of Natural Resources of an Alleged Unlawful)	
Construction and Maintenance of a Pier on)	
the Bed of Green Lake, Town of Princeton)	
Green Lake County, Wisconsin, by the)	
Lakeshore Pier Association)	

Application of Lakeshore Pier Association for)	Case No. 3-SD-93-2066P
an After-the-Fact Permit to Construct a Pier)	
on the Bed of Green Lake, Town of Princeton,)	
Green Lake County, Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Department of Natural Resources' Southern District staff alleges that the Lakeshore Pier Association has placed and maintained pier and boat slip structures on the bed of Green Lake in violation of §§30.12, 30.13 and 30.15, Stats. The Department further alleges that the piers and boat slips interfere with the rights and interest of the public, and of adjacent riparians, in Green Lake. Additionally, the Lakeshore Pier Association applied to the Department of Natural Resources for an after-the-fact permit to maintain pier and boat slip structures on the bed of Green Lake. Pursuant to §30.02(3), Stats., the Department of Natural Resources requested a public hearing before the Division of Hearings and Appeals on the application.

Pursuant to due notice, a combined hearing was held in Green Lake, Wisconsin on July 18, 1995 and September 7, 1995, before Mark J. Kaiser, Administrative Law Judge. The parties filed written argument after the hearing. The last brief was filed on October 11, 1995.

In accordance with §§227.47 and 227.53(1)(c), Stats., the parties to this proceeding are certified as follows:

Lakeshore Pier Association, by

Carl Sinderbrand, Attorney
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Madison, Wisconsin 53701-1683

Wisconsin Department of Natural Resources, by

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Thomas and Dale Nowicki, Objectors
424 South Waiola Avenue
LeGrange, Illinois 60525-2761

FINDINGS OF FACT

1. A group of thirteen non-riparian property owners jointly own a riparian access lot on Green Lake. The access lot is located in the northwest corner of Green Lake near Beyer's Cove. The legal description of the access lot is the West 1/2, Northwest 1/4 of Section 3, Town 15 North, Range 12 East, Green Lake County, Wisconsin. The property owners own separate backlots and a fractional (1/15 or 2/15) individual interest in the access lot. The access lot has sixty feet of frontage on Green Lake. Green Lake is navigable in fact at the access lot.

2. Eight of the property owners have formed the Lakeshore Pier Association (LPA). The LPA has maintained a pier at the access lot since 1979. From 1979 until 1992, the pier had three boat slips and space for one or two additional boats to tie up on a temporary basis. The pier was configured in a tee shape with the pier wings parallel to the shoreline.

3. In 1992, the LPA expanded the size of the pier. The size of the pier was increased to accommodate new property owners and somewhat larger boats. The configuration used in 1992 and 1993 was about ninety feet long and 34 feet wide. The main pier was constructed perpendicular to the shoreline and was ninety feet long and four feet wide. One finger pier, ten feet long and seven feet wide, extended from the west side of the main pier. Four finger piers extended from the east side of the main pier. Three of these finger piers were twenty feet long and three feet wide and the fourth finger pier was ten feet long and three feet wide. Another finger pier was constructed parallel to the main pier and extended from the most lakeward of the finger piers located on the east side of the main pier. This pier was twenty feet long and three feet wide. With this configuration the LPA pier could accommodate eight boats.

4. In April 1993, Tom and Dale Nowicki, the owners of the property immediately west of the access lot, complained to the Department of Natural Resources (Department) that the LPA pier was infringing on their rights as riparians. Victor Pappas of the Department investigated, met with the members of the LPA and provided regulatory

information to them. He advised them that they needed a permit for their pier because it exceeded the Department's reasonable use guidelines. Mr. Pappas also recommended that they reconfigure the pier in a herringbone pattern.

5. The members of the LPA submitted an application for a pier permit. The application is dated August 24, 1993. The proposed pier was configured in the herringbone pattern recommended by Mr. Pappas. The proposed pier was approximately 77 feet long and 42 feet wide with slips for eight boats. After further discussion with the Department, the owners modified the proposal in October 1993 to reduce the overall dimensions of the pier. The modified pier configuration is approximately 72 feet in length and has a maximum width of 38 feet. The water depth at the lakeward end of the pier ranges from approximately 48 inches to 57 inches. The proposed pier, as modified, is the subject of this hearing.

In the spring of 1994, the LPA was advised that the Department intended to prepare an environmental assessment (EA) on the LPA proposed pier and six other proposed piers on Green Lake before responding to the application of the LPA for a pier permit. The EA was completed in early 1995. In the meantime the LPA installed and maintained the pier as proposed during the summers of 1994 and 1995 without a permit.

6. The Department commenced an enforcement action pursuant to §30.03, Stats., seeking the removal of the allegedly unlawful pier. The hearing in the enforcement action was combined with a hearing on the application for a pier permit. The Department and the LPA have complied with all procedural requirements of §30.02, Stats.

7. The LPA pier extends slightly farther lakeward than the boat docking piers of the property owners on either side of the access lot. However, it is not significantly longer. Additionally, the neighbor to the east (Rusin) has a second pier as well as a swimming raft and a buoy moored offshore of his property. Rusin's second pier extends approximately as far into the lake as the LPA pier. The normal boating patterns in this area of Green Lake are undoubtedly beyond Rusin's swimming raft and buoy. The LPA pier does not constitute a material impairment to navigation.

8. Public interest in navigable water includes enjoying natural scenic beauty, boating, swimming, and other recreational activities. The natural scenic beauty of this portion of Green Lake is already compromised by shoreline development. However, the shoreline in the vicinity of the access lot is steep and forested. With the exception of the Rusin property, an individual who views this shoreline from the water sees a significant band of green. The LPA pier, especially with boats in the slips on lifts and with covers, is excessive and unreasonably detrimental to the public interest in the natural scenic beauty of the shoreline.

9. Since an enlarged LPA pier has been in place the past three summers there is little specific evidence of recent recreational activities occurring in the nearshore area near the access lot. However, in general a significant amount of recreational activity occurs in the nearshore area of the section of Green Lake in the vicinity of the access lot. Specifically, this area is used for swimming, wading and fishing. The size of the LPA pier physically precludes any recreational activities taking place in the nearshore area by the access lot.

Although the shoreline in this portion of Green Lake is highly developed, it appears from aerial photographs (such as exhibit 25) that the public has access to the nearshore area everywhere except at the access lot and the Rusin property. Maintenance of the LPA pier at the size sought in the permit application will be unreasonably detrimental to the public interest in using the nearshore area of this portion of Green Lake for recreational activities. The removal of the LPA pier is necessary to fully protect the public interest in Green Lake.

10. The bed of Green Lake at the access lot is rubble changing to sand with fine gravel. This area of Green Lake includes quality fish habitat, but the area is not considered unique fish habitat. The record contains no evidence that significant spawning activity occurs in the vicinity of the access lot. The area is not considered quality habitat for wildlife or aquatic plants. Maintenance of the LPA pier will not be detrimental to the public interest in preserving habitat for fish, wildlife or aquatic plants.

11. A public boat landing is available in Beyer's Cove which is about a half mile distance along the shoreline from the access lot. The property owners who have an interest in the access lot can launch their boats at the public launch. This is undeniably less convenient than keeping a boat on a pier, but is a reasonable alternative to maintaining an eight slip pier at the access lot. The applicants allege that without a permanent boat slip their properties will lose a substantial percentage of their value. Although such financial considerations are beyond the scope of the issues for this hearing, it should be noted that several families who have an interest in the access lot do not have a slip on the present pier and have not indicated to the LPA an interest in having a slip in the future. Clearly a market exists for backlots with access to Green Lake even without a permanent boat slip.

12. The applicants allege that one of the boats kept in a slip at the LPA pier (a Mach 1 owned by James Nirschl) requires a water depth in excess of 42 inches. The Department presented credible evidence that boats of comparable size and contour as Mr. Nirschl's boat are kept in slips with a water depth of less than three feet. Additionally, the Nowickis testified that prior to the reconfiguration of the LPA pier large boats owned by members of the LPA were kept in slips with water depth less than 42 inches. The applicants have not demonstrated a need for a water depth in excess of three feet for any of the boats presently stored at the LPA pier.

13. The applicants are financially capable of constructing, maintaining, monitoring or removing the proposed pier if it should be found in the public interest to do so.

14. The proposed pier will not reduce the effective flood low capacity of Green Lake upon compliance with the conditions in the permit.

15. The proposed pier will not adversely affect water quality nor will it increase water pollution in Green Lake. The proposed pier will not cause environmental pollution as defined in §144.01(3), Stats.

16. The Department of Natural Resources has complied with the procedural requirements of §1.11, Stats., and Ch. NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

DISCUSSION

The instant case is both an enforcement action and a review of an application for a pier permit. With respect to the enforcement action, the Department alleges that the subject pier requires a permit pursuant to §30.12, Stats. Section 30.13, Stats., allows a riparian owner to maintain a pier without a permit as long as five conditions are met. Chapter NR 326, Wis. Admin. Code, further describes under what conditions a permit is required for a pier. Specifically §NR 326.05, Wis. Admin. Code, provides that a permit is required if the subject pier does not conform with the conditions set forth at §NR 326.04(1), Wis. Admin. Code.

Section NR 326.04(1), Wis. Admin. Code, provides that a pier may not extend beyond the line of navigation unless a need can be demonstrated by the riparian that boats using the pier require a greater depth of water. The line of navigation is generally defined as the contour line at three feet of water depth. The LPA pier extends to a water depth of four feet. The applicants did not establish a need for a greater depth of water for any of the boats which will be routinely using the pier. Therefore, the LPA pier extends beyond the line of navigation and a permit is required for it.

Additionally, the number of boat slips the applicant has constructed exceeds the reasonable use for the amount of frontage owned by the applicant. For this reason also a permit pursuant to §30.12(2), Stats., is required for the subject piers. The Department has established that the applicant has violated §30.12, Stats. The Department has sustained its burden of proof in the enforcement action and an order requiring the removal of the subject piers is required unless a permit can be issued for the subject piers.

Section 30.13, Stats., allows a riparian owner to maintain a pier. A pier may contain more than one slip; however, pursuant to common law, a riparian owner is limited to the

reasonable use of his riparian zone. The issue is what constitutes reasonable use. The Department has attempted to define "reasonable use" in guidelines set forth in a memorandum dated December 19, 1991 (included in the Environmental Assessment, exhibit 24). The Department's guidelines with respect to boat slip density allow two slips for the first fifty feet of frontage and one slip for every additional fifty feet of frontage. The applicant has sixty feet of frontage, thus the Department's guidelines would allow slips for two boats on the applicant's frontage.

Although the guidelines are not law, they do provide a useful starting point for evaluating a pier application. Ultimately, however, each application must be considered on a case-by-case basis. The relevant statutory criteria are whether the structure constitutes an impairment to navigation or is detrimental to the public interest. Because the LPA pier does not extend into the lake beyond neighboring piers and obstructions, the pier does not constitute an impairment to navigation. However, the pier consumes an excessive amount of space relative to the amount of shoreline owned by the owners of the access lot.

The amount of space consumed by the LPA pier is detrimental to the public interest in enjoying the natural scenic beauty of the shoreline and use by the public of the nearshore area in this portion of Green Lake. Although it is difficult to quantify the detrimental effects to the public interest resulting from one pier, it is this type of incrementalism that the Wisconsin Supreme Court addressed in Hixon v. PSC, 32 Wis. 2d 608, 146 N.W. 2d 577 (1966). In Hixon, the court required the Department to consider cumulative impacts of intrusions into navigable waters.

CONCLUSIONS OF LAW

1. The applicants are riparian owners within the meaning of §30.12, Stats.
2. The proposed piers described in the Findings of Fact constitute structures within the meaning of §30.12, Stats.
3. The project is a type III action under §NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment. The Department prepared an Environmental Assessment (EA) in connection with this and related pier applications on Green Lake. The EA concluded that the project was not a major state action significantly affecting the quality of the human environment and that no EIS was required.
4. The subject piers do not constitute an impairment to navigation but are "detrimental to the public interest in navigable waters" within the meaning of §30.12(2), Stats.

5. Pursuant to §30.12, Stats. and §NR 326.05, Wis. Admin. Code, a permit is required for the subject pier. The pier was constructed and maintained without a permit. Accordingly, the construction and maintenance of the pier constitutes a violation of §§30.12 and 30.15, Stats.

6. The construction and maintenance of the subject pier in violation of §§30.12 and 30.15, Stats. constitutes a public nuisance pursuant to §30.294, Stats.

7. Pursuant to §§30.03(4)(a) and 227.43(1)(b), Stats., the Division of Hearings and Appeals has the authority to issue the following order.

ORDER

The application for a pier permit submitted by the Lakeshore Pier Association is denied and the Lakeshore Pier Association shall remove the pier placed on the bed of Green Lake at the access lot in 1995 and the pier shall not be reinstalled during any future navigational seasons.

Dated at Madison, Wisconsin on December 22, 1995.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By Mark Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.